APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23530.

FOREMOST DAIRIES, INC., and HOME TOWN FOODS, INC.,

Appellants,

versus

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Appellee.

Appeals from the United States District Court for the Middle District of Alabama.

(July 21, 1967.)

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

AINSWORTH, Circuit Judge: We are called upon here to interpret the meaning of the phrase "irregular hours of work" contained in Section 7(e) of the Fair Labor Standards Act of 1938.[1] Our interpretation

[1] 29 U.S.C. § 207(e), which provides:
"No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the

will determine the validity of a number of individual wage contracts between defendant and certain of its employees.

The Fair Labor Standards Act is a major enactment by Congress of social and economic policy, intended to protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce. See *Brooklyn Sav. Bank v. O'Neil,* 324 U. S. 697, 706, 65 S. Ct. 895, 902, 89 L. Ed. 1296 (1945). Section 7(a) of the Act[2] prescribes a maximum workweek of forty hours for an employee engaged in commerce unless the employee is paid at the rate of one and one-half times the regular rate for hours worked over forty. As the result of two decisions of the United States Supreme Court, *Walling v. A. H. Belo Corporation,* 316 U. S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716 (1942), and *Walling v. Halliburton Oil Well Cementing Co.,* 331 U. S. 17, 67 S. Ct. 1056, 91 L. Ed. 1312 (1947), Congress in 1949

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duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

[2] 29 U.S.C. § 207(a), which provides in pertinent part:
"(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed;"

amended the Act by adding Section 7(e) to give statutory recognition to the principles in those decisions.[3]

Section 7(e), commonly known as the "Belo" provision, provides an exception to the regular forty-hour maximum workweek where the employee is engaged in "irregular hours of work." Under this subsection the employer is deemed not to have violated the provisions of Section 7(a) by employing any employee for a workweek in excess of forty hours, if the employee is hired pursuant to a bona fide individual contract and his duties necessitate "irregular hours of work," and the contract (1) specifies a regular rate of pay not less than the minimum hourly rate provided in the Act and compensation of not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guarantee of pay for not more than sixty hours based on the rates so specified.

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[3] Representative Lucas, the chief sponsor of the provision of Section 7(e), issued a statement in connection with the legislation (see 95 Cong. Rec. A5475), the text of which, as to that section, reads as follows:

> "(a) Belo plan: Gives specific legislative approval to Belo type contracts (upheld by the United States Supreme Court), under which an employer may pay his employees who work different hours each week a fixed guaranteed weekly salary, thus assuring employees stability of income and employment. The contracts may be used only if the duties of the employees necessitate irregular hours of work. The contracts may be made either individually with the employees or with unions, but must specify a regular rate of not less than 75 cents and compensation at not less than time and one-half such 75-cent rate for all hours worked over 50 in 1 week. The contracts must also provide a weekly guaranty of pay for not more than 60 hours based on the rates so specified (sec. 7(e))."

On June 18, 1963, the district court enjoined Foremost Dairies, Inc., a large milk processor and ice-cream manufacturer, from violating the minimum wage, overtime and record-keeping provisions of the Act. Thereafter, on September 4, 1964, Home Town Foods, Inc. purchased substantially all the assets and operations of Foremost and is, therefore, its successor. Inspections of Home Town plants by representatives of the Wage and Hour Division resulted in the charge that Home Town was not complying with Section 7(a) of the Act in connection with payment to certain employees of a guaranteed weekly wage. This meant, in effect, that the Secretary did not agree that Home Town's so-called Section 7(e) Belo contracts with these employees were valid because the employees' hours of work were not irregular within the contemplation of the subsection, since they fluctuated only in overtime (i. e., over forty hours per week) and did not fluctuate in straight time below forty hours per workweek. On July 17, 1965, Home Town petitioned the district court to reopen the injunction proceedings in order to amend the judgment so that the company would not be denied the right to pay its employees pursuant to guaranteed weekly wage plans as authorized by Section 7(e) of the Act. The Secretary responded and petitioned the court for an adjudication of civil contempt.

After a hearing the district court held Home Town in civil contempt of the injunction, ordered it to pay fines in the sum of $1,888.65 and back pay of $8,819.16 to the employees involved, all of whom were

employed under so-called Section 7(e) Belo contracts. In well-considered, detailed reasons for judgment, the district judge found that all of the Section 7(e) employees worked a minimum of forty hours a week or more, and that Home Town had failed to satisfy its burden of proof[4] that the duties of these employees necessitated "irregular hours of work" within the meaning of Section 7(e) of the Act. The court held that the duties of none of these employees fluctuated within the range of hours in the *Belo* and *Halliburton* cases,[5] and that all of these employees have by reason of custom, practice of policy worked at least a regular minimum schedule of weekly hours except for absences due to vacations, holidays, illness or personal reasons. The court found that many of the in-

[4] The district judge cited several cases in support of the principle that an employer who claims an exemption under the Act has the burden of showing that it applies, e.g., *Walling v. General Industries Co.*, 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088 (1947), and *Walling v. Kentucky Finance Company*, 359 U. S. 290, 79 S. Ct. 756, 3 L. Ed. 2d 815 (1959). Appellant contends that these authorities are inapplicable, since they refer to Section 13 exemptions, and that Section 7(e) does not provide for an exemption but is an exception intended to be available to all employees who must work irregular hours and would benefit by it. It is correct that 7(e) provides an exception rather than an exemption but we see no essential difference between the two insofar as the law relating to burden of proof is concerned. The beginning phrase of Section 7(e) states "No employer shall be deemed to have violated subsection (a)" and shows unmistakably that Section 7(e) is an exception to the provisions of Section 7(a). See also *Wirtz v. C & P Shoe Corporation*, 5 Cir., 1964, 336 F. 2d 21.

[5] In both *Belo* and *Halliburton*, employees were required to work substantially fewer hours as well as substantially more than the statutory forty-hour standard because of the unpredictable irregularity inherent in the nature of their duties. *Belo* involved newspaper employees whose work schedules varied from a few hours a day to twelve hours per day. In *Halliburton*, oil well servicing employees worked many weeks for more than one hundred hours, others less than thirty, and 13 per cent of their workweeks amounted to less than forty hours.

stances of hours worked above the employees' regular minimum schedules were attributable to vacation and similar relief of other employees, predictable, seasonal and periodic work loads, and occasional short periods at the end of regular work days. We affirm.

There is no contest about the sufficiency in form of the separate Home Town employee (Belo) contracts providing a guaranteed weekly wage or that the rate of pay in the contracts provided overtime pay of one and one-half times the agreed hourly rate for a specified number of hours in excess of forty but less than sixty per week. In this case the specified hours for different employees varied, being forty-eight, fifty, fifty-two or fifty-four hours per week. It is not disputed that each of the employees involved worked minimum regular weekly schedules of forty hours or more each week. The fluctuations, therefore, were all in overtime hours in the range above forty hours per week. The serious issue presented for decision concerns the validity of the Belo contracts. If the contracts are void, the employees were not paid proper overtime compensation as required by the basic overtime standards of Section 7(a).

Home Town contends that the fluctuation in employees' working hours was necessitated by their duties involving unpredictable exigencies and unpredictable hours and that these fluctuations, though they occurred only in overtime hours, constituted "irregular hours of work" within the meaning of

Section 7(e) of the Act. The company states that guaranteed wage contracts were used by it to minimize the variations in weekly pay to which these employees would be subject if paid on a regular hourly basis without any guarantee. It argues that Section 7(e) is concerned solely with eliminating or minimizing variations in overtime pay caused by irregular overtime hours and that the purpose of Section 7(e) is to afford stability of income which would not be possible under a regular hourly rate of pay; that the Secretary is attempting administratively to prevent effective use of Belo contracts and thus abrogate Section 7(e).

The Secretary contends that Section 7(e) was not intended to apply to employees who regularly work a minimum schedule of hours equal to or exceeding the statutory workweek standard of forty hours, where the only irregularity is in the overtime hours worked. He states that since each employee works a minimum of forty hours or more each week, he thus has the necessary workweek security referred to in the *Belo* case and the guaranteed weekly salary does no more.[6]

The Secretary's Interpretative Bulletin, 29 C.F.R. § 778.406, provides that Belo contracts lack the ir-

[6] The Supreme Court in *Walling v. A. H. Belo Corporation,* 316 U. S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716 (1942) commented on the guarantee arrangements of the contracts as follows:

> "This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance."

regularity of hours required by Section 7(e) where the employment hours fluctuate only in the overtime range above the maximum forty-hour workweek prescribed by the statute.[7]

[7] Section 778.406 provides as follows:

"Nonovertime hours as well as overtime hours must be irregular if section 7(e) is to apply.

"Any employment in which the employee's hours fluctuate only in the overtime range above the maximum workweek prescribed by the statute lacks the irregularity of hours for which the Supreme Court found the so-called 'Belo' contracts appropriate and so fails to meet the requirements of section 7(e) which were designed to validate, subject to express statutory limitations, contracts of a like kind in situations of the type considered by the Court (see § 778.404). Nothing in the legislative history of section 7(e) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed. Section 7(a) was specifically designed to deal with such a situation by making such regular resort to overtime more costly to the employer and thus providing an inducement to spread the work rather than to impose additional overtime work on employees regularly employed for a workweek of the maximum statutory length. The 'security of a regular weekly income' which the Supreme Court viewed as an important feature of the 'Belo' wage plan militating against a holding that the contracts were invalid under the Act is, of course, already provided to employees who regularly work at least the maximum number of hours permitted without overtime pay under section 7(a). Their situation is not comparable in this respect to employees whose duties cause their weekly hours to fluctuate in such a way that some workweeks are short and others long and they cannot, without some guarantee, know in advance whether in a particular workweek they will be entitled to pay for the regular number of hours of nonovertime work contemplated by section 7(a). It is such employees whose duties necessitate 'irregular hours' within the meaning of section 7(e) and whose 'security of a regular weekly income' can be assured by a guarantee under that section which will serve to increase their hourly earnings in short workweeks under the statutory maximum hours. It is this benefit to the employee that the Supreme Court viewed, in effect, as a quid pro quo which could serve to balance a relaxation of the statutory requirement, applicable in other cases, that any overtime work should cost the employer 50 percent more per hour. In the enactment of section 7(e), as in the enactment of section 7(b) (1) and (2),

The Secretary states that historically his interpretation dates back to 1950 and his first bulletin interpreting the 1949 amendments, which contained the following provision:

> "The type of employment agreement permitted under section 7(e) can be made only with (or by his representatives on behalf of) an employee whose 'duties * * * necessitate irregular hours of work.' It is clear that no contract made with an employee who works a regularly scheduled workweek or whose schedule involves alternating fixed workweeks will qualify under this subsection. * * *" [Feb. 4, 1950, Fed. Register p. 637, §778.18 (b)]

The Secretary further states:

> "This provision has been consistently continued in the successive reprints and amended Interpretative Bulletins through the most recent one issued Febraury 2, 1965 (Fed. Reg.

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the benefits that might inure to employees from a balancing of long workweeks against short workweeks under prescribed safeguards would seem to be the reason most likely to have influenced the legislators to provide express exemptions from the strict application of section 7(a). Consequently, where the fluctuations in an employee's hours of work resulting from his duties involve only overtime hours worked in excess of the statutory maximum hours, the hours are not 'irregular' within the purport of section 7(e) and a payment plan lacking this factor does not qualify for the exemption. (See Goldberg v. Winn-Dixie Stores (S. D. Fla.), 15 WH Cases 641; Wirtz v. Midland Finance Co. (N. D. Ga.), 16 WH cases 141; Trager v. J. E. Plastics Mfg. Co. (S. D. N. Y.), 13 WH Cases 621; McComb v. Utica Knitting Co., 164 F. 2d 670.)"

§778.405). Since, as found by the trial court, all of the employees here involved 'have regularly worked minimum daily and weekly schedules * * *' * * *, the above-quoted interpretation—which dates back to the first year after enactment of Section 7(e), and has been consistently maintained since—would, without more, operate to exclude the application of Section 7(e).

"The more specific position that the irregularity of hours requirement is not met in cases where the employee's hours fluctuate only in the overtime range—which, in effect, is no more than an elaboration of the earlier more general interpretation—was expressly enunciated by the Secretary in 1958 shortly after the decision in *Trager v. J. E. Plastics Mfg. Co.*, decided February 27, 1958 * * *. As appears in the opinion in *Mitchell* (Secretary of Labor) *v. Independent Stave Co.*, 168 F. Supp. 830, at 832 (W. D. Mo., September 22, 1958), the Secretary at that trial advanced this position in reliance on the *Trager* decision. The Secretary also took this specific position in the *Winn-Dixe* and *Midland Finance* cases (decided in September 1962 and June 1963, respectively). The courts in the latter two cases approved and adopted this specific interpretation * * *."[8]

[8] The Secretary's position which we have quoted is contained in a letter to the Court dated May 19, 1967, in response to our question at oral argument as to when the Secretary first adopted his interpretation relative to Section 7(e). Appellant contends,

The Opinion Letter of the Wage-Hour Administrator dated March 7, 1962, CCH Labor Law Reporter § 30,617, holds that a Belo contract guaranteeing weekly pay is invalid if the fluctuations in weekly hours occurred only occasionally, if the fluctuations are only in the number of overtime hours worked, or if fluctuations below forty hours a week are not substantial.[9]

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however, in its letter response to the Court's question, that "This section first appeared in the Interpretative Bulletins on February 2, 1965; there is no reference to any 'below 40 rule' in former Interpretative Bulletins, Section 778.18, which construed Section 7(e) during the period 1950-1965. Prior to the *Trager* and *Independent Stave Co.* decisions in 1958, we are not aware of any official position that fluctuations below 40 are required by Section 7(e)."

[9] The Opinion Letter reads in full as follows:

"This is in reply to your letter enclosing a proposed agreement governing the compensation of the X firm, of which you are a partner. You wish to know whether payment of this employee in accordance with the agreement will meet the requirements of the Fair Labor Standards Act.

"The agreement, of the type sometimes referred to as a *Belo* contract, is designed to qualify under Section 7(e) of the Act, a copy of which is enclosed. Also enclosed is an Interpretative Bulletin Part 778 on Overtime Compensation. Section 778.18 of the bulletin explains the general conditions under which payment of an employee in accordance with a guaranteed weekly pay contract will comply with the minimum wage and overtime provisions of the Act. You will note from the statement stamped on the cover that this bulletin has not been revised to conform with the minimum wage increase provided by the 1961 amendments to the Act.

"It is the Divisions' position that a guaranteed pay agreement will not meet the requirement that the employees duties 'necessitate irregular hours of work' where the fluctuations in his weekly hours occur only occasionally, or only in the number of overtime hours he may work, or if fluctuations below 40 hours a week are not substantial.

"The agreement you submitted appears to meet all requirements of Section 7(e); however, the validity of such a contract depends upon whether the terms of the agreement actually are followed and whether, in fact, the duties of the employee necessitate irregular hours of work as required by this Section of the Act. For this reason it is not possible to give you a definite ruling solely on the basis of the proposed agreement."

We are, of course, not bound by interpretative bulletins or administrative opinions. However, the Supreme Court said in *Overnight Motor Transp. Co. v. Missel,* 316 U. S. 572, 580, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942): "While the interpretative bulletins are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." In *Skidmore v. Swift & Co.,* 323 U. S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944), the Supreme Court further held: "We consider that the rulings, interpretations and opinions of the Administrator under this Act [Fair Labor Standards Act], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Several district court decisions have passed on the below forty-hour fluctuation requirement as interpreted by the Secretary. In *Goldberg v. Winn-Dixie Stores, Inc.,* 1962, S. D. Fla., 46 L. C. ¶ 31,334 (15 W. H. Cases 641), in a case where all of defendant's ployees under Belo contracts worked regularly at least forty hours per week, the court (Simpson, J.)

held that these employees had the necessary workweek security without a guaranteed weekly salary, and that the phrase "irregular hours of work" would not include a situation where the irregular hours involved only overtime work, in excess of forty hours a week. The court cited *Trager v. J. E. Plastics Mfg. Corp.*, 1958, S. D. N. Y., 34 L. C. ¶ 71,320 (13 W. H. Cases 621), in support of its holding. In *Trager*, the employee involved worked regularly at least forty hours a week and only the amount of his overtime hours varied. The court held:

> "In the absence of satisfactory proof indicating that in some workweeks plaintiff worked less than the statutory minimum of 40 hours, the provision of Section 7(e) providing that the duties of such employee necessitate irregular hours of work', is not met by proof indicating 'irregularity' in his overtime hours for a portion of the year."[10]

In *Wirtz v. Midland Finance Co.*, 1963, M. D. Ga., 48 L. C. ¶ 31,473 (16 W. H. Cases 141), the court

[10] In *Trager*, the court pointed out that the statute is silent as to the meaning of the clause that "the duties [must] recessitate irregular hours of work" but said that the judicial decisions prior to 1949 are helpful. *McComb v. Utica Knitting Co.*, 2 Cir., 1947, 164 F. 2d 670, was cited to the effect that there must be, as there was in *Belo* and *Halliburton*, "a condition of irregularity or instability of work, so that the guaranty yields the employees a stability of employment and income otherwise absent." In *Trager*, the court said that there must be irregularity in the number of hours worked per week less than forty and that irregularity in the overtime hours alone is not of itself sufficient, and cited in support of its holding, *Mitchell v. Feinberg*, 2 Cir., 1956, 236 F. 2d 9, cert. den. 352 U. S. 943, 77 S. Ct. 266, 1 L. Ed. 2d 239 (1956) and *Mitchell v. Brandtjen & Kluge, Incorporated*, 1 Cir., 1955, 228 F. 2d 291.

found that all of the Belo employees involved worked considerably more hours than forty in the usual workweek and, therefore, that the Section 7(e) contracts were invalid. It held:

> "The requirement contained in § 7(e) of the Act that the 'duties of such employee necessitate irregular hours of work . . .' is not satisfied in a situation where the irregular hours involve only overtime work in excess of 40 hours per week and do not involve straight time hours. Since there is no evidence of any irregularity of fluctuation of straight time hours worked we find that the employees claimed to have been employed by the Defendants pursuant to the provisions of § 7(e) of the Act do not validly come within the exemption provided by that Section."[11]

We hold that the Secretary's interpretation of Section 7(e), 29 C.F.R. § 778.406, is a valid and reasonable interpretation of the meaning of Section 7(e) of the Act. It is a restatement of the *Belo* principles and is well supported by the antecedent judicial and legislative history. It is based on sound, realistic principles for any other construction of the subsection would seriously challenge the effectiveness of Section 7(a) of the Act which prescribes a statutory maximum workweek with overtime compensation for hours in excess thereof. We do not, by this holding,

[11] *Mitchell v. Independent Stave Company*, 1958, W. D. Mo., 168 F. Supp. 830, expresses a contrary view to that of *Winn-Dixie Stores, Trager* and *Midland Finance*, though the court held the employment contracts invalid on other grounds.

minimize the propriety of valid Section 7(e) contracts. However, when logically applied, appellant's contention that the fluctuation in the workweek hours need occur only in overtime hours would make it rather easy to substitute Section 7(e) contracts for virtually all employees and thereby strike at a vital provision of the Act, Section 7(a).[12]

If the fluctuation of hours in average workweeks varies only in overtime hours, there is not such irregularity of hours, in our view, as would justify our holding that individual employment contracts under Section 7(e) are valid. Where employees regularly work at least the maximum number of hours per workweek permitted without overtime pay being due under Section 7(a), and any irregularity of fluctuation in workweek hours occurs only in hours over the maximum, in overtime hours, such fluctuation does not constitute "irregular hours of work" and Belo contracts with such employees are invalid under Section 7(e).

Section 7(e) is silent on the degree of fluctuation required, and the phrase "irregular hours of work" is

[12] We do not read our decision in *Mitchell v. Adams,* 5 Cir., 1956, 230 F. 2d 527, cited by appellant, in any way to the contrary. An entirely different question relative to the validity of an interpretation by the Secretary concerning Belo Section 7(e) contracts was involved, i.e., whether the actual hours of work should at least, to some extent, equal and exceed the contract maximum period. We held the interpretation invalid. It should be noted that the evidence in *Adams,* according to the trial court's finding, was that "excess hours were offset by frequent and lengthy periods in slack seasons in which there was little or no work with less than forty hours actually worked" (230 F. 2d at 529, n. 5). Thus, these contracts were of the true "Belo" variety.

undefined. However, we must give an interpretation to the section which would give effect to the central purpose of the statute itself. See *Florida Citrus Exchange v. Folsom*, 5 Cir., 1957, 246 F. 2d 850, reversed 358 U. S. 153, 79 S. Ct. 160, 3 L. Ed. 2d 188 (1958). This is eloquently expressed in the Act itself, Section 2 (29 U.S.C. § 202), in which Congress declared "that the existence, in industries engaged in commerce . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channel and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . ."

AFFIRMED.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Entered: July 21, 1967

ORDER.

IT IS ORDERED that appellants be granted an extension to and including September 11, 1967, within which to file a petition for rehearing in the above entitled and numbered cause.

(S.) JAS. P. COLEMAN,
U. S. CIRCUIT JUDGE

Entered: August 14, 1967

ORDER.

Before COLEMAN and AINSWORTH, Circuit Judges, and CARSWELL, District Judge.

PER CURIAM: IT IS ORDERED that appellants' petition for rehearing in this cause is hereby DENIED.

Entered: September 20, 1967

APPENDIX B.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 1867-N.

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

FOREMOST DAIRIES, INC., a Corporation,
Defendant.

MEMORANDUM OPINION.

On June 18, 1963, this Court rendered a Judgment permanently enjoining Foremost Dairies, Inc., a corporation, its officers, agents, servants, employees, and all persons acting or claiming to act in its behalf and interest from violating the provisions of Sections 15(a)(2), 15(a)(4) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C., 201, et seq.).

On July 17, 1965, Home Town Foods, Inc., filed a motion for partial relief from the Judgment with respect to certain situations where some of its employees have been paid on a weekly guarantee of pay. Home Town Foods, Inc., claims an overtime exemption for these employees under Section 7(e) of the Act (29 U.S.C. 207(e)). Home Town Foods, Inc.,

hereinafter referred to as defendant, has acknowledged that it is a successor to Foremost Dairies, Inc., with respect to the Judgment previously referred to and has further acknowledged its responsibility under the Act and the Judgment for violations, if any, of the Act and the Judgment as to these employees beginning June 18, 1963.

On August 14, 1965, plaintiff filed a response to the aforesaid motion and petitioned the Court for adjudication of civil contempt and other relief.

The aforesaid motions were heard on November 19, 1965. The matter is now submitted upon the pleadings, the stipulations, affidavits, depositions, exhibits and briefs of the parties. Upon this submission, including the history of this case, as above recited, this Court now, in this Memorandum Opinion, proceeds to make the appropriate Findings of Fact and Conclusions of Law:

Findings of Fact.

1. At Bristol, Virginia, defendant maintains a milk processing plant, a local distribution operation, and a "district" office from which production and distribution operations are supervised and controlled in several states. At Spartanburg, South Carolina, defendant maintains an establishment producing ice cream for distribution by other outlets throughout the Bristol district, and a local milk distribution operation. The employees involved here were employed in

these operations of the defendant and were each engaged in commerce within the meaning of the Act.

2. These employees have been paid a regular amount each week for their hours up to a "guaranteed" number which varied from employee to employee. The highest number was 54. The lowest was 48. A separate agreement was made for each employee and each agreement recites a "regular rate" plus overtime for the guaranteed weekly wage. Each employee was paid time and one-half the recited rate for his weekly hours in excess of the guaranteed wage. Unless the exemption provided by Section 7(e) is established by the defendant, then the regular rate for each week must be determined by dividing the guaranteed weekly wage by the number of hours worked for the guaranteed wage. These employees would then be due the unpaid one-half of the regular rate for the hours worked in excess of 40 each week. *Motor Transportation Co. v. Missel,* 316 U.S. 572, 62 S.Ct. 1216.

3. The issues here are whether the duties of these employees necessitate irregular hours of work within the meaning of the Section 7(e) exemption. The employees involved are: Howell I. Barnes, Gene Allen Barr, John D. Evans, Arthur H. Patterson, Kelcy C. Rutherford, Woodrow W. Vine, Harry B. Warren, James D. Wilson and Stewart Wood, all at Bristol, Virginia; and Herman Boiter, Claude Ellison, Leroy Garrett, A. B. Haggard, James H. McDowell, George O. Neal, Rufus Steadman, Raymond West and Dennis Woodsby at Spartanburg, South Carolina.

4. The evidence before the Court includes summaries of weekly hours worked and wages paid, the deposition testimony of defendant's witnesses and stipulations of the parties. The summaries do not purport to designate any significant portion of the weeks in which the weekly hours were affected by absences due to vacation, holidays, sickness or personal reasons of the employee. All of these employees have been absent from time to time because of vacations, holidays, sickness and personal reasons of the employees. Accordingly, no further findings as to such absences of specific employees are necessary. Except for such absences, these employees have regularly worked minimum daily and weekly schedules totaling 40 hours a week or more.

5. In the Bristol "district" office, employees Barr, Evans, Vine, Wilson and Wood performed various accounting duties. They regularly worked a minimum of 8 hours a day Monday through Friday. Each Saturday, the office was kept open to check in the sales of the routemen and one or more of them worked up to a half day each Saturday. Also, they occasionally relieved other employees because of vacations or illness and they each worked a few additional hours in one or two weeks of each month in closing out the monthly books and preparing reports for submission to the defendant's home office. Some of these employees traveled to other plants of defendant, but the evidence doesn't show that such travel significantly affected the number of hours worked.

6. Patterson and Warren were maintenance mechanics performing general maintenance work on the equipment in the Bristol plant. Except for absences due to vacations, illness or personal reasons, they regularly worked a minimum of 9 hours a day, five days a week plus one additional half day. On many days, they worked 30 minutes to an hour later. Also, the defendant installed its own equipment rather than contracting for this and in addition to their regular schedules these employees performed this additional work when the plant was not operating. During a few months Warren was an operating engineer working a minimum 8 hour a day shift, five days a week. In addition, he worked a scheduled 6th day about every third week and occasionally stayed 30 minutes to an hour later than his regular shift. Normally defendant employed four persons to perform the operating engineer functions and the work on the 6th day was alternated among the operating engineers. During a part of the period, defendant employed only three operating engineers and the excess work beyond their regular shifts was divided among them.

7. Barnes was a shipping clerk who made and kept records pertaining to the shipments and transfers of ice cream and milk from the Bristol plant. He regularly worked a minimum of 10 hours a day 4 days a week and 4 additional hours on a fifth day of work. He occasionally stayed later than his usual quitting time to handle a late loading and he occasionally filled in for other employees as vacation or illness relief. Rutherford was a milk production supervisor

at the Bristol plant who testified that he could come and go as he pleased so long as he accomplished the production job for which he was responsible. Nevertheless, he adhered to the same kind of minimum weekly schedule as did the other employees—in his case, substantially in excess of 40 hours a week except for absences due to vacation, holidays, illness or personal reasons.

8. At the Spartanburg plant Boiter was the office manager. He regularly worked a minimum of 8-1/2 hours a day 5 days a week, an additional half day in most weeks, and a few additional hours at the beginning and end of each month to complete periodic monthly reports. He also occasionally relieved other employees who were on vacation or out sick. Ellison was a receiving clerk regularly working a minimum of 9-1/2 hours a day, 5 days a week and an additional 2 hours on Sundays. He also stayed an hour or two later on some days. Garrett and Haggard were milk shipping clerks who regularly worked a minimum of 8 to 8-1/2 hours a day, 5 days a week and an additional 8 hour day every other week. Occasionally, they worked a little longer than the 8-1/2 hours if the transport trucks bringing in milk were late.

8. McDowell and West were maintenance engineers regularly working a minimum of 9 and 8-1/2 hours a day, respectively, 5 days a week. They also alternated up to two hours work each Sunday. Sometimes they also worked later than their usual quitting times and were called in earlier than their

usual starting times. Neal was an ice cream production supervisor working a minimum schedule of 10 to 12 hours a day four days a week plus a partial or whole fifth day, mostly in the busy summer workweeks.

9. Roland performed auditing, clerical and accounting work. He regularly worked a minimum of 9 hours a day Monday through Friday plus a half day on Saturday. On three or four days each month, usually during the first part of the month, he worked a little longer. Steadman was in charge of ordering and shipping milk. He regularly worked a minimum of 9 hours a day, 6 days a week except for one of the 6 days when he left a few hours early. In addition, he sometimes worked an hour or so later than his usual quitting time if incoming transport trucks were late. Woodsby was an equipment cleaning night foreman regularly working a minimum of 10 to 12 hours a night, 4 nights a week. In the summer he had more equipment to clean and additional personnel were assigned to assist him. Usually, in the summer he worked about 12 hours a night and in the winter about 10 hours a night.

10. The defendant claims an executive or administrative exemption under Section 13(a)(1) of the Act and the regulations thereunder for Evans, Wood and Boiter. Substantial parts of the duties of each of these employees were comprised of routine bookkeeping, report making and clerical work outside the scope of the exemption. Defendant has not separated these

activities to show that the 20% tolerance provided in the regulations is not exceeded.

Conclusions of Law.

1. The form of the Section 7(e) or "Belo" type contracts used by the defendant herein appears to be sufficient, and the form of contract, as such, has not been questioned. Sufficiency as to form, however, does not mean that the contracts are valid. Section 7(e) of the Act provides a special exemption from the requirements of Section 7(a) thereof. It is well settled by controlling decisions under the Act that: (a) An employer who claims an exemption under the Act has the burden of showing that it applies (*Walling v. General Industries Co.*, 330 U.S. 545; *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290); (b) Conditions specified in the language of the Act are "explicit prerequisites to exemption". (*Arnold v. Kanowsky*, 361 U.S. 388); (c) "the details with which the exemptions in this Act have been made preclude their enlargement by implication." (*Addison v. Holly Hill*, 322 U.S. 607; *Maneja v. Waialua*, 349 U.S. 254); (d) Exemptions provided in the Act "are to be narrowly construed against the employer seeking to assert them," and their application limited to those who come plainly and unmistakably within their terms and spirit, this restricted or narrow construction of the exemptions being necessary to carry out the broad objectives for which the Act was passed. (*Phillips v. Walling*, 324 U.S. 490; *Mitchell v. Kentucky Finance Co., supra*).

2. The key requirement of Section 7(e) of the Act is that the "duties of such employee necessitate irregular hours of work . . ." These statutory terms are expressed in terms of ordinary usage and common understanding. Nevertheless, they should not be treated in the abstract. An interpretation of these statutory terms must be made in light of the employer-employee relationships here involved.

3. In many respects, it is clear from the evidence of record that the employees here have differing work functions. Thus, there are here involved employees whose classifications vary from bookkeeping and accounting to maintenance mechanics. Obviously, the basic work functions of a bookkeeper and a maintenance mechanic are different. The evidence in this cause does not clearly establish, however, that the basic work functions of these employees have been determinative of the hours worked by them. All of them have, by reason of custom, practice or policy, worked at least a regular minimum schedule of weekly hours, except for absences due to vacations, holidays, illness or personal reasons. Thus, even if the basic demands of a particular employee's duties had necessitated irregular hours of attention or physical work, the custom, practice, or policy of a regular minimum workweek has largely circumscribed the hours and regular weekly income of these employees. Such a custom, practice or policy must be considered in determining whether a particular employee's duties necessitate irregular hours of work within the meaning of the statute.

4. Many of the instances of hours worked above the employees' regular minimum schedules are attributable to vacation and similar relief of other employees, predictable seasonal and periodic workloads, and occasional short periods at the end of regular workdays. These factors are not separated in this record with any appreciable precision.

5. The duties of none of these employees have required anything like the type of fluctuation of hours necessitated by the character of the duties of the news reporters in *Walling v. Belo Corp.*, 316 U. S. 624 or of the oil well service employees in *Walling v. Halliburton Oil Well Cementing Company*, 331 U. S. 17, whose hours, being dependent upon irregular and unpredictable occurrences and demands, (or the absence thereof) fluctuated "drastically from workweek to workweek" (*Walling v. Belo Corp.*, at 632).

6. It is the conclusion of this Court that the defendant has not satisfied its burden of showing that the duties of these employees necessitated irregular hours of work within the meaning of Section 7(e) of the Act. Neither has defendant satisfied the explicit conditions of Section 13(a)(1) and the regulations thereunder as to Evans, Wood or Boiter.

7. The aforesaid underpayments are in violation of the Act and this Court's Judgment of June 18, 1963. Thus, the defendant, by reason of its conduct, after having knowledge of the said Judgment, is guilty of civil contempt by its failure to comply with said Judgment.

8. This Court now specifically concludes that it has jurisdiction of this proceeding. *Jacksonville Paper Co. v. Tobin,* 206 F. 2d 333 (5th Cir., 1953). Further, that by violating the injunction of this Court, the defendant has held said injunctive judgment and the authority of this Court in contempt. It matters not that defendant's violation of Sections 7 and 15(a)(2) of the Act, as above specified, was not willful. In such instances, since the purpose is remedial, the intent of the defendant in committing the prohibited acts is immaterial. As was stated by the Supreme Court in *McComb v. Jacksonville Paper Co.,* 336 U.S. 187:

> "*First.* The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce complaince with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. See *United States v. United Mine Workers,* 330 U.S. 258, 303-304; *Penfield Co. v. Securities & Exchange Commission,* 330 U.S. 585, 590; *Maggio v. Zeitz,* 333 U.S. 56, 68. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions. And the

> grant or withholding of remedial relief is not wholly discretionary with the judge, as Mr. Justice Brandeis wrote for a unaminous Court in *Union Tool Co. v. Wilson,* 259 U.S. 107, 111-112. The private or public rights that the decree sought to protect are an important measure of the remedy."

The granting or withholding of remedial action in cases such as this is not wholly discretionary with the Court. *NLRB v. Warren Company,* 350 U.S. 107, 113.

9. This Court further concludes that in order for the defendant to purge itself of contempt of this Court, it must be required to pay the damages for the violations of this Court's decree. In order to grant adequate remedial relief, defendant will be required to pay to plaintiff for distribution to the aforesaid employees the sum of $8,819.16, said sum representing the overtime underpayments due said employees. In addition the defendant will be required to pay to plaintiff a compensatory fine in the amount of $1,888.65 for the purpose of reimbursing the plaintiff, in part, for his reasonable costs and expenses in the investigation of this matter and the prosecution of this action.

10. Plaintiff by its petition of August 14, 1965 seeks also to enlarge the scope of the Judgment of June 18, 1963 to specifically include employees covered by the "enterprise" provisions of the Act created by the 1961 amendments to the Act. The above-mentioned employees are employed in an enterprise engaged in

commerce or in the production of goods for commerce as defined in Section 3(s)(1) of the Act and by an establishment described in Section 3(s)(3) of the Act. The violations heretofore described are thus also violations of Section 7(a)(2) of the Act. Such enlargement of the Judgment is appropriate.

11. Since the issues raised by defendant's motion filed on July 17, 1965, have been decided adversely to it by the conclusions above, the motion will be denied.

Judgment will be entered accordingly.

Done, this the 17th day of January, 1966.

(S. FRANK M. JOHNSON, JR.,
UNITED STATES DISTRICT
JUDGE.

JUDGMENT.

Pursuant to the Findings of Fact and Conclusions of Law made and entered by this Court in its Memorandum Opinion of this date

It is the ORDER, JUDGMENT and DECREE of this Court that the defendant Home Town Foods, Inc., a Corporation, be and it is hereby declared in civil contempt of this Court's Judgment of June 18, 1963 in that the said defendant has violated the said Judgment and Sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended.

It is the further ORDER, JUDGMENT and DECREE of this Court that the defendant, Home Town Foods, Inc., a Corporation, within 15 days from the date of this Judgment, pay to the plaintiff the sum of $8,819.16 for distribution as follows:

Name	Back Wage Amount
Howell I. Barnes	$350.74
Gene Allen Barr	219.51
John D. Evans	556.22
Arthur H. Patterson	906.11
Kelcy C. Rutherford	289.99
Woodrow W. Vine	359.14
Harry B. Warren	413.82
James D. Wilson	188.33
Stewart Wood	344.95
Herman Boiter	772.41
Claude Ellison	474.93
Leroy Garrett	459.83
A. B. Haggard	706.28
James H. McDowell	732.15
George O. Neal	377.11
Rufus Steadman	435.16
Raymond West	847.56
Dennis Woodsby	384.92

The plaintiff shall distribute such sum (less deductions lawfully required) in accordance with and as though this payment were made under section 16(c) of the Act.

It is the further ORDER, JUDGMENT and DECREE of this Court that the defendant Home Town Foods, Inc., a Corporation, within fifteen (15) days from the date of this Judgment, pay to the plaintiff the sum of $1,888.65 as a compensatory fine, said fine being for plaintiff's reasonable costs and expenses in the investigation and prosecution of this action.

It is the further ORDER, JUDGMENT and DECREE of this Court that the defendants, Foremost Dairies, Inc., and Home Town Foods, Inc., their agents, servants, employees, attorneys and all persons acting or claiming to act in their behalf and interest be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(2), 15(a)(4) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C., Sec. 201, et seq.), hereinafter referred to as the Act in any of the following manners:

1. The defendants shall not, contrary to Section 6 and 15(a)(2) of the Act, pay any of their employees who are engaged in commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in Section 3(s)(1) of the Act, or who are employed by an establishment described in Section 3(s)(3) of the Act, wages at rates less than one dollar and twenty-five cents ($1.25) an hour or at rates less than any other minimum rate which may be made applicable by amendment to the Act.

2. The defendants shall not, contrary to Sections 7 and 15(a)(2) of the Act, employ any of their employees in Commerce, or in an enterprise engaged in commerce or in the production of goods for commerce as defined in Section 3(s)(1) of the Act, or by an establishment described in Section (s)(3) of the Act for a workweek longer that forty (40) hours unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

3. The defendants shall not fail to make, keep and preserve records of their employees and of the wages, hours and other conditions and practices of employment maintained by them, as prescribed by regulations of the Administrator issued and from time to time amended, pursuant to Section 11(c) of the Act, and found in 29 CFR 516.

4. The defendants shall not, contrary to Sections 12(c) and 15(a)(4) of the Act, employ oppressive child labor, as defined by the Act, in commerce or in any enterprise engaged in commerce or in the production of goods for commerce.

It is the further ORDER, JUDGMENT and DECREE of this Court that the defendants' motion filed July 17, 1965, be and the same is hereby denied.

It is the further ORDER, JUDGMENT and DECREE of this Court that the costs be taxed against the defendant, Home Town Foods, Inc., for which execution may issue. The Marshal shall serve a copy of this Judgment on the defendants.

Done this 17th day of January, 1966.

(S.) FRANK M. JOHNSON, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX C.

316 U. S. 624.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 622.

L. METCALF WALLING, Administrator of the Wage and Hour Division, U. S. Department of Labor,

versus

A. H. BELO CORPORATION.

Argued April 6, 1942.

Decided June 8, 1942.

Mr. Justice BYRNES delivered the opinion of the Court.

This is a proceeding by the Administrator of the Wage and Hour Division of the Department of Labor to restrain the respondent corporation from alleged violation of the

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Fair Labor Standards Act.[1] The Administrator sought to prevent the use by respondent under cer-

[1] Enforcement of the requirements of the Act by injunction is authorized by section 17. "The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and

tain contracts with its employees of wage agreements deemed by the Administrator violative of the time and a half for overtime provisions of section 7(a)[2] as implemented by section 15(a) (1) and (2).[3]

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subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., 1934 edition, title 28, sec. 381), to restrain violations of section 15 [215]." 52 Stat. 1069, 29 U.S.C. § 217, 29 U.S.C.A. § 217.

[2] "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 52 Stat. 1063, 29 U.S.C. § 207, 29 U.S.C.A. § 207.

[3] "Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act [sections 201-219 of this title], it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 [206] or section 7 [207], or in violation of any regulation or order of the Administrator issued under section 14 [214]; except that no provision of this Act [chapter] shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act [chapter] shall excuse any common carrier from its obligation to accept any goods for transportation;

"(2) to violate any of the provisions of section 6 [206] or section 7 [207], or any of the provisions of any regulation or order of the Administrator issued under section 14 [214]; * * *." 52 Stat. 1068, 29 U.S.C. § 215, 29 U.S.C.A. § 215.

The respondent, a Texas corporation, is the publisher of the Dallas Morning News and other periodicals, and the owner and operator of radio station WFAA. It has some 600 employees. Those in the mechanical departments work under a collective bargaining agreement and are not involved in the present dispute. The others, and particularly those in the newspaper business, work irregular hours. Prior to the effective date of the Act, October 24, 1938, respondent had been paying all but two or three of these employees more than the minimum wage required by the Act. They received vacations of approximately two weeks each year at full pay; special bonuses at the end of the year amounting to approximately one week's earnings; and full pay during periods of illness, sometimes continuing for weeks and sometimes for months. At the time of the trial 28 superannuated employees were carried on the payroll at full rates of pay. Employees were permitted absences to attend to personal affairs without deductions from pay. When they were required to work long hours in any week, they were given compensating time off in succeeding weeks. Life insurance was carried for them at respondent's expense.

After the enactment of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., but before its effective date, respondent endeavored to adjust its compensation system to meet the requirements of the Act by negotiating a contract with each of its em-

ployees except those in the mechanical departments. These contracts were in the form of letters stating terms which were agreed to by the employees. The following is a typical letter:

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"The Fair Labor Standards Act which goes into effect on October 24, 1938, provides for the following minimum wages and maximum hours of employment:

"First year—25c per hour minimum
44 hours maximum per week

"Second year—30c per hour minimum
42 hours maximum per week

"Third year—40c per hour minimum[4]
40 hours maximum per week

except that employees may work more than the number of hours specified above, provided that overtime rates shall be a minimum of one and one-half times the basic rate.

"In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be ..... 67 ..... cents per hour

[4] In later letters this misstatement, immaterial here, was corrected. The minimum wage for the first 40 hours remains 30 cents until October 24, 1945. See § 6 of the Act.

for the first forty-four hours each week, and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than ..... $40 ....."

In most cases, as in this example, the specified hourly rate was fixed at 1/60th of the guaranteed weekly wage. The result, was that during the first year under the Act when the statutory maximum of regular hours was 44, the employee was required to work 54½ hours before he became entitled to any pay in addition to the weekly guaranty.[5]

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When the employee worked enough hours at the contract rate to earn more than the guaranty, the surplus time was paid for at the rate of 150% of the hourly contract wage. If the employee received an increase in pay, the hourly rate and weekly rate were readjusted.

For eighteen months the system embodied in these contracts was followed to the apparent satisfaction of employer and employees. Respondent was then advised that the arrangement was in violation of the

[5] 44 hours at 67 cents equals $29.48; 10 2/3 hours at the statutory minimum overtime rate of $1.00 (150%×$.67) equals $10.50; $29.48 plus $10.50 equals $39.98.

Act and that it was liable to its employees in an amount of from 30 to 60 thousand dollars. It was informed by the regional director in Dallas and by an official in the Administrator's office in Washington that an employee's complaint had precipitated the investigation. These officials declined to give the name of the employee.

Respondent thereupon brought suit for a declaratory judgment in the District Court for the Northern District of Texas joining the regional director and three of its employees as defendants. The defendant employees answered that they and all the other employees affected by the system approved of it. The regional director moved to dismiss on two grounds, one of which was that he represented none of the employees. The motion to dismiss was denied. A. H. Belo Corporation v. Street, D.C., 35 F.Supp. 430. In the meantime petitioner instituted this suit to enjoin respondent from continuing to operate the wage system based upon its contracts with its employees. The two suits were consolidated and tried together. The District Court entered a declaratory judgment for the respondent and dismissed the bill for an injunction. 36 F.Supp. 907.

Petitioner appealed to the Circuit Court of Appeals from the dismissal of its complaint. That Court affirmed the judgment of the District Court. Fleming v. A. H. Belo Corporation, 5 Cir., 121 F.2d 207, 210. It found that the contracts were "actual bona fide contracts of employment" and that "they were intended

to, and did, really fix the regular rates at which each employee was

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employed." We granted certiorari because of the importance of the question in the administration of the Act. 314 U.S. 601, 62 S.Ct. 137, 86 L.Ed. .....

It is no doubt true, as petitioner contends, that the purpose of respondent's arrangement with its employees was to permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rates equals or exceeds the minimum required by the Act.[6]

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[6] Section 18 provides: "No provision of this Act [sections 201-219 of this title] shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act [sections 201-219 of this title], or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act [such sections]." Whatever the legal effect of this language, it is certainly not a prohibition and the Administrator does not rely upon it. The finding of the Circuit Court of Appeals that respondent's effort to maintain the weekly incomes of its employees at their pre-Act level was in good faith gains support from the circumstance that at the very time when respondent was formulating its new wage policy the Wage and Hour Administrator declared:

"Clerical forces, we all feel, are included in the Act. But I cannot see where there is going to be any practical difficulty there because your clerical force in any plant of any consequence certainly is earning on a basis of more than 25 cents an hour weekly wages divided by the hours they work. If they are well above 25 cents an hour, it seems to me that there would not be much question about time and a half for overtime, because you could figure in that weekly wage that time and a half over the 44 hours had been given consideration as remuneration for their full week's pay."

Speech before the Southern States Industrial Council at Birmingham, Alabama, on September 29, 1938. 3 Wage and Hour Reporter 228.

The Act requires that for each hour of work beyond the statutory maximum the employees must be paid "not less than one and one-half times the regular rate at which he is employed." This case turns upon the meaning of the words "the regular rate at which he is employed." Respondent

contends that the regular rate under the illustrative contract, which is set out above and to which we shall refer throughout, is 67 cents an hour. Petitioner argues, however, that the 67 cents hourly rate mentioned in the contract is meaningless and that the agreement is in effect for a weekly salary of $40 without regard to fluctuations in the number of hours worked each week. Treating the contract as one for a fixed weekly salary, he urges that the regular hourly rate for any single week is the quotient of the $40 guaranty divided by the number of hours actually worked in that week.[7] Under this formula the employee is entitled to the regular hourly rate thus determined for the first 44 hours[8] each week and to not less than one and one-half times that rate for each hour thereafter.

In its initial state the question to which this dispute gives rise is a question of law, a question of interpretation of the statutory term "regular rate". But

[7] This has been the Administrator's interpretation of the Act, as set forth in Interpretative Bulletin No. 4, issued October 21, 1938 and revised in November, 1940.

[8] For the first year after passage of the Act; now 40 hours.

it is agreed that as a matter of law employer and employee may establish the "regular rate" by contract. In the case before us such an effort has been made, and in the example given the regular rate has been specified as 67 cents an hour. The difficulty arises from the inclusion of the $40 guaranty. The problem is whether the intention of the parties to set 67 cents an hour as the regular rate squares with their intention to guarantee a weekly income of $40. The Administrator's position is that these two objectives are inherently inconsistent and that the intention to fix the regular hourly rate at 67 cents is overridden by the intention to guarantee the $40 per week.

We cannot agree. In the first place, when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guarantee. The record

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shows that in such a case, the employee is paid at the rate of $1.00 an hour (150%×$.67) for each hour of overtime. In this situation, then, it is clearly the guaranty that becomes inoperative and the 67 cent hourly rate fixed by the contract that is controlling.

In the second place, although it is perfectly true that when the employee works less than 54½ hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to say this. The question remains whether the $40 con-

templates compensation for overtime as well as basic pay. The contract says that the employee is to receive 67 cents an hour for the first 44 hours and "*not less than* one and one-half times such basic rate" for each hour over 44. Consequently, if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44×$.67) plus $10.52 for the remaining six hours (6×$1.753). To be sure, $1.753 is more than 150% of $.67. But the Act does not prohibit paying more; it requires only that the overtime rate be "not less than" 150% of the basic rate. It is also true that under this formula the overtime rate per hour may vary from week to week. But nothing in the Act forbids such fluctuation.

The gist of the Administrator's objection to this interpretation is that both the basic rate and the overtime rate are so "artificial" that the parties to the contract cannot fairly be supposed to have intended that it be so construed. It cannot be denied that the flexibility of the overtime rate is considerable, but this flexibility may well have been intended if it was the only means of securing uniformity in weekly income. Moreover, under the Administrator's interpretation, the regular rate in the example given is $40 divided by the number of hours worked each week. Since the number of hours worked fluctuates so drastically from week to week, this "regular" rate is certainly "irregular" in a mathematical sense. And inasmuch as it cannot be

calculated until after the workweek has been completed, it is difficult to say that it is "regular" in the sense that either employer or employee knows what it is or can plan on the basis of it.

The artificiality of the method urged by the Administrator is accentuated by the nature of his counter-proposal of two plans by which the weekly wage of an employee whose hours vary from week to week may be stabilized. One of these officially approved plans is known as the "time-off plan" and is explained in Interpretative Bulletin No. 4. Under this plan the employment must be placed upon an hourly rate basis with no mention of a guaranty. The pay days must be spaced at intervals of two weeks or longer. If the pay period is set at two weeks and the employee is required to work overtime during the first week, he is given sufficient time off during the second week to keep his paycheck at a constant level. In our view this counter-proposal far exceeds in technicality the plan adopted by respondent. Moreover its operation is to provide a ceiling but not a floor for the wage. Since the pay is by the hour and there is no guaranty, in a pay period in which an employee works few hours, his wage may fall far below the level aimed at.

The other officially approved arrangement is known as the "pre-payment plan", and is also explained in Bulletin No. 4. Under this plan virtually the same arrangements as that which we have been us-

ing as an example can stand. That is to say, an employee may be promised 67 cents an hour for the first 44 hours, $1.00 for each hour over 44,[9] with a guaranty of $40 a week. However, in any week in which the employee's earnings at the stated hourly rates do not equal the $40 guaranty, the balance necessary to fulfill the guaranty must be treated as a loan to him. If

in any succeeding week his earnings at the stated hourly rates exceed the guaranty, the excess is withheld by the employer as a repayment of the loan. But if his earnings do not exceed the guaranty in any succeeding week, and after receiving his pay check he does not return to work, the employer is presumed to make an effort to collect the excess amount paid to the employee in a previous week. If the employer does not recover this excess amount, then for all practical purposes the plan operates just as does the plan followed by the respondent in this case. About the only difference is that one is called a "guaranty plan" while the other is called a "pre-payment plan". In the opinion of the Administrator, the "pre-payment plan" is lawful; the "guaranty plan" is unlawful.

But the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that

[9] It should be noted that respondent's contract, set out above, does not fix $1.00 as the hourly rate for overtime. Instead it provides that the overtime rate shall be "not less than one and one-half" times 67 cents.

rate for every hour of overtime work beyond the maximum hours fixed by the Act. It is entirely unlike the Missel case, Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. ...., decided this day. In the contract in that case there is no stated hourly wage and no provision for overtime. Under the decision in that case an employer who engages a worker for a fixed weekly wage of $40 for irregular hours and works him 65 hours (in a year when the maximum workweek is 44 hours), owes the employee $46.38. See Missel case. For the same hours under the Belo contract, at the hourly contract rate of 67 cents, the worker would receive $50.48. There is a difference in compensation, but that is the agreement of the parties and it is within the letter and the intention of the law.

The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of "regular rate" when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable.

And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the

Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with regular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not.

Affirmed.

Mr. Justice REED, dissenting.

The Court holds, "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours." Yet it is recognized by the Court that the validity of the contract "turns upon the meaning of the words 'the regular rate at which he is employed,'" the phrase left undefined by Congress, which it is said the

courts also should leave undefined and flexible. Not only does the Court's conclusion assume that the typical Belo contract conforms to the Fair Labor Standards Act by the provision for hourly wages and time and a half for overtime,

but in the opinions just announced, the Court approves this type contract for hiring "so long as the new rate equals or exceeds the minimum required by the Act." In so deciding the Court gives the phrase "regular rate" an interpretation as inflexible and artificial as that which it condemns.

The Court's interpretation that, in the absence of bad faith, any form of contract which assures the payment of the minimum wage and the required overtime complies with the Act may be assumed to be correct. But since the overtime hours must be compensated "at a rate not less than one and one-half times the regular rate at which he is employed" (Sec. 7(a)(3)), the regular rate cannot be left without "definition", "flexible" or unfound for this case. And once so found, it must be applied to the circumstances of this litigation. No all inclusive definition will be attempted. The possibilities of variation in contracts are too great. Certainly, however, the Court does not mean to say that the employer and employee may capriciously select a certain figure, unrelated to the wages paid, and say "That is the regular rate of employment." Every contract of employment is as-

sumed, by the statute, to contain a "regular rate," and for each contract it is a legal, not a factual, conclusion. What that rate is here is the object of our inquiry. Once determined for this case, that conclusion becomes a precedent for other similar contracts and so in one sense, whether we wish it or not, a definition to be applied in the administration of the Act.

This Court accepts the view that the Fair Labor Standards Act was intended not only to put a floor under wages but also a ceiling over hours. The limitation of hours in turn had two purposes—the spreading of work and extra compensation for overtime, no matter how high the regular wage may be. Overnight Motor Transportation Co. v. Missel, 16 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. ...., decided June 8, 1942. Since overtime pay must at least equal time and a half the regular rate, as section 7(a)

specifies, employers and employees may not be permitted to contract in avoidance of the statutory requirement. Contracts for a regular rate per hour conform easily to the requirements but contracts for compensation in other forms compel an analysis of their terms to find the regular rate. Fixed salaries, as this Court agrees today in Missel's case, are to be reduced to hourly rates on the basis of a week as the unit of time. Belo's contract contains elements both of hourly wage and fixed weekly wage contracts. We come then to this point. Are the contracts here involved for weekly wages with variable hours or for hourly rates with time and a half of such

rates for overtime? If the latter, respondent contends the Act has left him free to contract with his employees at such hourly regular rates as may be agreed upon, limited only by the minimum wage requirements. As a court, we must appraise the nature of these contracts and in my judgment they are agreements for weekly wages for variable hours, with a provision for additional compensation per hour contingent upon work in excess of an ascertainable number of hours—the number of hours of work required for the wages earned under the hourly wage terms of the contract to equal the guaranty.[1] Until these hours are exceeded, the stipulated wage per hour has no demonstrable effect.

The contracts stated they were drawn to comply with the "scheme of the Act without reducing" weekly wages. The hourly rate was customarily written as one-sixtieth of the weekly wages. The overtime above the maximum hours was set at 150% of the hourly wage or one-fortieth of the weekly. This was then followed by a guaranty that the employee should "receive weekly," for regular and overtime, the former weekly wage. This guaranty was the dominating feature of the contract. Without the guaranty, the adoption of a low hourly rate would encounter

the full weight of employee bargaining power. The guaranty avoids this conflict by fixing the minimum

[1] Cf. Carleton Screw Products Co. v. Fleming, 8 Cir., 126 F.2d 537.

weekly wage. This guaranty controls the weekly wage up to 54½ hours of work, the number of hours contracted for by Belo without paying more than the fixed weekly wage. In a 54½ hour week or less the regular rate should be the guaranty divided by the hours actually worked.

It seems obvious that the guaranty was the heart of the arrangement. The effect of the contract in the illustrative case is to pay 73 cents an hour for work up to 54½ hours and $1.00 (expressed in the circumlocution of time and a half 67 cents) for overtime beyond those hours, with a guaranty that there will be $40 worth of work each week. The "basic" hourly rate, the hours contracted for at the basic rate and the stated percentage paid for overtime may be varied without effect on earnings provided the guaranty and real overtime rate are kept fixed.[2]

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[2] An example will illustrate the lack of significance of the other numbers in the contract. Varying rates, hours and overtime percentages are substituted for those in the Belo contract quoted in the Court's opinion. "In order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise that from and after October 24, 1938, your basic rate of pay will be [50] cents per hour for the first [29] hours each week, and that for time over [29] hours each week you will receive for each hour of work not less than [double] time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40.00."

29 hours×$.50=$14.50. 54.5 hours—29 hours=25.5 hours at $1.00 per hour=$25.50. Time plus overtime=$40.00. Thereafter the employee receives $1.00 per hour.

The same is true of a basic rate of $.60 for 36 1/4 hours and time and two-thirds, thereafter, with a guaranty of $40.

The employee willing, the number of hours which must be worked to earn the guaranty can be increased by suitable adjustment of the contract figures of hourly rate, hours contracted and overtime percentages. By such a

verbal device, astute management may avoid many of the disadvantages of ordinary overtime, chief of which is a definite increase in the cost of labor as soon as the hours worked exceed the statutory workweek. If the intention of Congress is to require at least time and half for overtime work beyond a fixed maximum number of hours (40, 42 or 44 hours), that intention is frustrated by today's holding. Under Missel's case, an employer who engages a worker for a fixed weekly wage of $40 for irregular hours and works him 54½ hours a week in a year with a 44 hour maximum, owes $43.86. Under the Belo contract, the worker would receive $40. Because there is no increase of labor cost between the statutory maximum and the hours contracted for (54½), the employer has a financial inducement to require hours beyond the statutory maximum.

As pointed out above, this contract is not only an agreement to pay a fixed wage, $40.00, for variable hours up to 54½ but there is a provision for additional compensation for the hours over the contract maximum. Where the hours worked exceed the number necessary to entitle the employee to hourly pay under

the contract, equal in the aggregate to the guaranty, the employee is entitled to receive his regular rate for the statutory maximum hours and 150% of that rate for all overtime. The contracts in most instances fixed the basic rate at one-sixtieth of the guaranty, but the effect of the guaranty, in our view, is to make the regular rate of employment for the precise number of hours necessary under the contract to earn the guaranty, the quotient of the guaranty divided by the hours.[3] For

640

the surplus hours over 54§ the same regular rate continues to be applicable.[4]

It is the guaranty which gives character to these contracts, which determines the amount to be received by the employee under its terms, except in the instances of work beyond 54½ hours. It is only work beyond the 54½ hours which calls for extra pay from the employer. Consequently it seems proper to find the regular rate of employment by using the guarantee as the dividend and the maximum hours

[3] Weekly guaranty—$40. Hours worked—54 2/3. Straight hourly contract wage—$40÷60=$.66 2/3. Straight contract hours—44. 44×$.66 2/3=$29.33 1/3. Overtime hourly contract wage—$1.00. Overtime contract hours—10 2/3. 10 2/3×$1=$10.66 2/3. Total contract wage paid—$40. Statutory regular rate—$40÷54 2/3=$.732 per hour. Statutory maximum hours—44. 44×$.732=$32.20. Statutory overtime rate—$1.098. Statutory overtime hours=10 2/3. 10 2/3×$1.098=$11.71. Total required compensation—$43.91.

[4] Hours worked—60. Statutory maximum hours—44. Regular rate—$.732. 44×$.732=$32.20. Statutory overtime hours—16. Overtime rate—$1.098. 16×$1.098=$17.57. Total required compensation—$49.77.

possible without increased contract pay as the devisor. The objection that this permits statutory overtime pay to be computed on contract overtime pay springs from the wording of the contract making the guarantee cover overtime up to the 54½ hours. This objection loses its force with the determination that the guaranty fixes the quality of the contract, rather than the so-called basic or hourly rate of pay.

The judgment of the Circuit Court of Appeals should be reversed and this action remanded to the District Court for further proceedings.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this dissent.